

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10

11 JOVANNY HERNANDEZ,

12 Petitioner,

13 v.

14 CHRISTIAN PFEIFFER,

15 Respondent.  
16  
17  
18

Case No. 1:20-cv-01235-NONE-HBK

FINDINGS AND RECOMMENDATIONS TO  
GRANT RESPONDENT'S MOTION TO  
DISMISS AND TO DISMISS THE CASE<sup>1</sup>

OBJECTIONS DUE IN TWENTY-ONE  
DAYS

(Doc. No. 11)

ORDER DIRECTING CLERK TO PROVIDE  
PETITIONER WITH CIVIL RIGHTS  
COMPLAINT FORM

19 Petitioner Jovanny Hernandez ("Petitioner" or "Hernandez"), a state prisoner in the  
20 custody of the California Department of Corrections and Rehabilitation ("CDCR"), initiated this  
21 action by filing a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254, which was  
22 docketed by the Clerk of Court on September 1, 2020.<sup>2</sup> (Doc. No. 1). In response, Respondent  
23 filed a motion to dismiss. (Doc. No. 11). Respondent seeks dismissal of the petition on two  
24

25 <sup>1</sup> This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302  
(E.D. Cal. 2019).

26 <sup>2</sup> The Court generally applies the "prison mailbox rule" to *pro se* prisoner petitions, deeming the petition  
27 filed on the date the prisoner certifies he delivered it to prison authorities for forwarding to the clerk of  
28 court. *See Saffold v. Newland*, 250 F.3d 1262, 1265, 1268 (9th Cir.2000), *overruled on other grounds*,  
*Carey v. Saffold*, 536 U.S. 214 (2002). Here, Petitioner certifies that he delivered the petition to  
correctional officials for mailing on July 27, 2020. *See* Doc. No. 1 at 15.

1 grounds: (1) the petition fails to state a cognizable claim for which habeas relief can be granted  
2 because success on the petition will not affect the length or duration of Petitioner's confinement;  
3 and (2) the petition is otherwise untimely. (Doc. No. 11). After being afforded an extension of  
4 time, Petitioner filed a response to Respondent's motion. (Doc.14). Respondent, thereafter, filed  
5 a reply. (Doc. No. 15). Based upon a review of the pleadings, the record, and governing law the  
6 undersigned recommends Respondent's motion to dismiss be granted.

## 7 **I. BACKGROUND**

8 Hernandez is serving an indeterminate 50 year to life sentence in state prison for his 2008  
9 conviction of first-degree murder and personally discharging a firearm. (Doc. 1 at 1; Doc. No.  
10 11-3 at 11). Although Hernandez is serving an indeterminate 50 year to life sentence, he is  
11 eligible for periodic youth offender parole suitability hearings. (Doc. No. 14 at 2). Hernandez  
12 claims his next parole hearing will occur in 2031, or possibly earlier. (*Id.*).

13 The petition challenges a June 22, 2018 prison disciplinary hearing decision that found  
14 Hernandez guilty of violating a prison rule for possession of a deadly weapon. (Doc. No. 1 at 5).  
15 Hernandez claims that the prison's disciplinary procedures violated his due process rights,  
16 resulting in a wrongful loss of 181 days of good time credit. (*Id.* at 15, 18). Hernandez filed an  
17 inmate appeal with the CDCR and obtained a third level appeal decision on November 6, 2018.  
18 (Doc. No. 1 at 44-45). Thereafter, Hernandez file a state petition for writ of habeas corpus in  
19 Kern County Superior Court, which although docketed on December 18, 2018, bore a mailing  
20 date of December 1, 2018. (Doc. 11-1 at 1, 118-19). On April 2, 2019, the Kern County Superior  
21 Court denied the state petition, finding some evidence to support petitioner's finding of guilt and  
22 no grounds for expungement of the disciplinary finding. (Doc. 11-2). On November 26, 2019,  
23 over seven months later, Hernandez filed a petition in the Fifth Appellate District Court of  
24 Appeals. (Doc. 11-3). The appellate court summarily denied relief, without explanation, on  
25 January 17, 2020. (Doc. 11-4). Hernandez filed his petition with the California Supreme Court  
26 on February 10, 2020, although it bore a certification of mailing date of January 31, 2020. (Doc.  
27 No. 11-5). The California Supreme Court denied the petition on June 10, 2020. (Doc. No. 11-6).

## II. STANDARD OF REVIEW

Under Rule 4, if a petition is not dismissed at screening, the judge “must order the respondent to file an answer, motion, or other response” to the petition. R. Governing 2254 Cases 4. The Advisory Committee Notes to Rule 4 state that “the judge may want to authorize the respondent to make a motion to dismiss based upon information furnished by respondent.” In *White v. Lewis*, 874 F.2d 599, 602-03 (9th Cir. 1989), the Ninth Circuit held that a motion to dismiss based on procedural default is proper in habeas proceedings. Since that time, the Ninth Circuit has affirmed cases where habeas petitions were dismissed on a respondent’s motion to dismiss for untimeliness. *Orthel v. Yates*, 795 F.3d 935, 938 (9th Cir. 2015) (affirming district court’s grant of respondent’s motion to dismiss petition as untimely because petitioner “did not establish an exceptional circumstance that would warrant equitable tolling”); *Stancl v. Clay*, 692 F.3d 948, 951 (9th Cir. 2012) (same); *Velasquez v. Kirkland*, 639 F.3d 964, 966 (9th Cir. 2011). In doing so, the Ninth Circuit has explicitly relied on information supplied outside the pleadings and its attachments, such as medical records. *Orthel*, 795 F.3d at 940. The undersigned finds because the statute of limitation is a procedural bar, the Court may consider the documents submitted by Respondent for purposes of determining whether the petition is timely and whether Petitioner is entitled to equitable tolling. *Id.*

## III. APPLICABLE LAW AND ANALYSIS

### a. Failure to State a Cognizable Claim

“The habeas statute unambiguously provides that a federal court may issue a writ of habeas corpus to a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’” *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam) (quoting 28 U.S.C. § 2254(a)). If a prisoner’s claim “would necessarily demonstrate the invalidity of confinement or its duration,” a habeas petition is the appropriate avenue for the claim. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). In contrast, if a favorable judgment for the petitioner would not “necessarily lead to his immediate or earlier release from confinement,” he may assert his claim only under 42 U.S.C. § 1983. *Nettles v. Grounds*, 830 F.3d 922, 935 (9th Cir. 2016); *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curiam) (“Challenges to the

1 validity of any confinement or to particulars affecting its duration are the province of habeas  
2 corpus; requests for relief turning on circumstances of confinement may be presented in a § 1983  
3 action.”). “[I]f a state prisoner’s claim does not lie at ‘the core of habeas corpus,’ *Preiser*, 411  
4 U.S. at 487, it may not be brought in habeas corpus but must be brought, ‘if at all,’ under § 1983,  
5 *Skinner*, 562 U.S. at 535 n.13.” *Nettles*, 830 F.3d at 934.

6 According to the petition, both Hernandez and his cellmate were charged with possession  
7 of a deadly weapon in violation of prison rules. (Doc. No. 1 at 5). At Hernandez’s cellmate’s  
8 disciplinary hearing, the cellmate stated that the weapon was his and that Hernandez was not  
9 aware of the weapon. (*Id.*). The statement made by the cellmate about the weapon was not  
10 disclosed during Hernandez’s hearing. (*Id.*). Hernandez was found guilty of possession of a  
11 deadly weapon and sanctioned with the loss of 181 days of good time credit. (*Id.* at 5, 20).  
12 Hernandez claims that his due process rights were violated because the prison officials failed to  
13 disclose the alleged exculpatory statement made by his cellmate during his hearing. (*Id.* at 5).

14 Respondent argues that Hernandez’s claim is not cognizable under federal habeas review  
15 because the restoration of his good time credits would not necessarily lead to Hernandez’s  
16 immediate or earlier release from confinement as required by *Nettles*. (Doc. No. 11 at 4-5).  
17 Respondent notes that because Hernandez has no fixed release date from prison, his release date  
18 is indeterminate. (*Id.* at 5). Respondent argues that there is no way to determine when, and even  
19 if, Hernandez will be released on parole. (*Id.*).

20 In his reply brief, Hernandez states that, as a youth offender, he is eligible for parole  
21 consideration in 2031. (Doc. No. 14 at 2). Just as in *Nettles*, Hernandez is serving an  
22 indeterminate sentence with the *possibility* of parole. *See Nettles*, 830 F.3d at 924 (emphasis  
23 added). And just as in *Nettles*, Hernandez argues that expungement of the rule violation will  
24 result in an earlier parole hearing date, and consequently an earlier release date. (Doc. No. 14 at  
25 2). Hernandez also argues that expungement of the rule violation will lower his classification  
26 level and allow him to participate in certain programming that the parole board looks favorably  
27 upon. (*Id.*).

1           The Court disagrees with Hernandez and instead finds Respondent’s contention that a  
2 restoration of Hernandez’s good time credits would not *necessarily* guarantee his earlier release  
3 correct. The mere possibility that an inmate may get an earlier parole review hearing or may have  
4 a more favorable outcome from the parole hearing does not meet the *Nettles* “necessarily”  
5 requirement. *See Nettles*, 830 F.3d at 934-35 (“Success on the merits of Nettles’s claim would  
6 not necessarily lead to immediate or speedier release because the expungement of the challenged  
7 disciplinary violation would not necessarily lead to a grant of parole.”). This is so because, in  
8 addition to disciplinary infractions, the parole board considers a long list of other factors when  
9 determining whether an inmate is eligible for parole. *See* Cal. Code Regs. tit. 15, § 2402(b); *In re*  
10 *Vicks*, 56 Cal. 4th 274, 294-99 (2013) (discussing California’s parole system and parole  
11 suitability factors). “Because the parole board has the authority to deny parole on the basis of any  
12 of the grounds” available to it, “the presence of a disciplinary infraction does not compel the  
13 denial of parole, nor does an absence of an infraction compel the grant of parole.” *Nettles*, 830  
14 F.3d at 935; *see, e.g., Pettis v. Asuncion*, Case No. CV 16-4241 CBM(JC), 2017 U.S. Dist.  
15 LEXIS 33382, at \*5 (C.D. Cal. Jan. 26, 2017), adopted by 2017 U.S. Dist. LEXIS 33377, 2017  
16 WL 923895 (C.D. Cal. Mar. 8, 2017) (explaining that even if petitioner were to have his  
17 disciplinary action expunged and his good time credits restored, these actions would not  
18 necessarily lead to his earlier release on parole); *Burton v. Adams*, No. 1:09-CV-00354-JLT HC,  
19 2010 U.S. Dist. LEXIS 22960, at \*6-7 (E.D. Cal. Feb. 25, 2010) (“The fact that Petitioner may  
20 legally accrue credits that can be used in the calculation of his [minimum eligible parole date] has  
21 such an attenuated, remote, and speculative bearing upon the sentence that Petitioner may  
22 ultimately have to serve before being released on parole that the Court simply cannot predicate  
23 habeas jurisdiction upon it.”).

24           Accordingly, it is indeterminable whether Hernandez will be released at his next parole  
25 hearing or whether he will be denied parole and continue serving his sentence. The restoration of  
26 the good time credits spelling Hernandez’s earlier release is at most theoretical. Instead,  
27 Hernandez’s release date is too attenuated, remote, and speculative to meet the *Nettles*  
28 requirement that any potential habeas relief must “necessarily” result in speedier release.

1 Accordingly, the Court finds that Hernandez’s claim is not cognizable on federal habeas review  
2 and recommends that Respondent’s motion to dismiss be granted.

3 Although the Court recommends that the petition be dismissed, this action does not  
4 preclude Hernandez from seeking relief in a 42 U.S.C. § 1983 civil rights claim if he so chooses,  
5 as contemplated by *Nettles*. See *Nettles*, 830 at 935. Under § 1983, a plaintiff is required to show  
6 “that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by  
7 the Constitution or federal statutes.” *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir.  
8 1986). A person deprives another of a constitutional right, “within the meaning of § 1983, ‘if he  
9 does an affirmative act, participates in another’s affirmative act, or omits to perform an act which  
10 he is legally required to do that causes the deprivation of which complaint is made.’”  
11 *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting  
12 *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). Thus, to the extent that Hernandez  
13 contends that his due process rights were violated during the subject disciplinary hearing and as a  
14 result he is being denied access to certain programming to which he otherwise would be entitled,  
15 he may file a civil rights action to obtain either monetary and/or injunctive relief, if appropriate.  
16 Accordingly, the Court will direct the clerk of court to provide Hernandez with a blank prisoner  
17 civil rights complaint form.

#### 18 **b. Timeliness of the Petition**

19 In the alternative, Respondent submits that the petition is untimely. (Doc. No. 11 at 5-7).  
20 Specifically, Respondent argues that because Petitioner did not file his state appellate court  
21 habeas petition in a “reasonable” amount of time after the state superior court denied his habeas  
22 petition, as required by California law, he is barred from statutory tolling under AEDPA. (*Id.*).

23 Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), petitioners seeking  
24 habeas relief under § 2254 must comply with a one-year statute of limitations. As a general rule,  
25 the one-year clock starts to run on “the date on which the judgment became final by the  
26 conclusion of direct review or the expiration of the time for seeking such review.” 42 U.S.C. §  
27 2244(d)(1)(A).  
28

1 Under § 2244(d)(1), the limitations period begins to run on “the date on which the factual  
2 predicate of the claim or claims presented could have been discovered through the exercise of due  
3 diligence.” When a petitioner challenges the outcome of a prison disciplinary hearing, the one-  
4 year limitations period starts to run under 28 U.S.C. § 2244(d)(1) after the final administrative  
5 decision regarding the disciplinary hearing is issued by the prison. *Shelby v. Bartlett*, 391 F.3d  
6 1061, 1063 (9th Cir. 2004). Here, the final administrative decision denying Hernandez relief in  
7 connection with his disciplinary hearing was issued on November 6, 2018. (Doc. No. 11-1 at 54-  
8 55). Thus, the limitations period began to run the next day, November 7, 2018, and expired  
9 November 7, 2019. Giving Petitioner the benefit of his July 27, 2020 date that he certified he  
10 placed the petition in the institutional mail, the instant federal petition would be untimely, absent  
11 statutory or equitable tolling.

12 Statutory tolling applies to the “time during which a properly filed application for State  
13 post-conviction or other collateral review with respect to the pertinent judgment or claim is  
14 pending.” *Id.* § 2244(d)(2). A judgment or claim is pending “until the application has achieved  
15 final resolution through the State’s post-conviction procedures.” *Carey v. Saffold*, 536 U.S. 214,  
16 220 (2002). Unlike most other states, California does not mandate fixed dates within which a  
17 petitioner is required to lodge an appeal. *Id.* at 222. Instead, petitioners are required to file an  
18 original habeas petition and a subsequent appeal in each level of court (superior, appellate, and  
19 supreme) within a “reasonable” period. *Id.* at 221-22; *Robinson v. Lewis*, 9 Cal.5th 883, 897  
20 (2020) (“There are no specific time limits for either filing the first [habeas] petition or filing  
21 subsequent petitions in a higher court. Instead, California courts employ a *reasonableness*  
22 standard. The claim must generally be presented without substantial delay.”). A petition is  
23 considered no longer “pending,” and the petitioner is barred from AEDPA statutory tolling if an  
24 unreasonable amount of time elapsed between the filing of state court habeas petitions. *Saffold*,  
25 536 U.S. at 221.

26 To determine whether a habeas claim was filed within a reasonable amount of time,  
27 California courts consider three factors. *Robinson*, 9 Cal.5th at 897. First, “a claim must be  
28 presented without *substantial delay*.” *Id.* (emphasis in original). “Substantial delay is measured

1 from the time the petitioner or his or her counsel knew, or reasonably should have known, of the  
2 information offered in support of the claim and the legal basis for the claim.” *Id.* (quoting *In re*  
3 *Robbins*, 18 Cal. 4th 770, 780 (Cal. 1998). Second, if a petition was filed with substantial delay,  
4 a petition may yet be considered on the merits if the “petitioner can demonstrate *good cause* for  
5 the delay.” *Id.* (emphasis in original). Third, a petition filed without good cause for substantial  
6 delay will be considered if it falls under one of four narrow exceptions. *Id.* Only three of the four  
7 exceptions are relevant to noncapital cases: (1) the “error of constitutional magnitude led to a  
8 trial that was so fundamentally unfair that absent the error no reasonable judge or jury would have  
9 convicted the petitioner;”(2) “the petitioner is actually innocent of the crime or crimes of which  
10 he or she was convicted;” and (3) “the petitioner was convicted or sentenced under an invalid  
11 statute.” *In re Reno*, 55 Cal. 4th 428, 460 (Cal. 2012) (quoting *Robbins*, 18 Cal. 4th at 780).  
12 Although the California Supreme Court has stated that six-months would normally be “unduly  
13 generous,” the court has stated that a “safe harbor” of 120 days is “reasonable.” *Robinson*, 9 Cal.  
14 5th at 901.

15 Here, Hernandez filed his appeal in the state appellate court over seven months after the  
16 state superior court denied his petition. (Doc. No. 11-3). This seven-month delay is beyond the  
17 “unduly generous” period and well beyond the presumptive 120 reasonable time. *Id.* Hernandez  
18 neither shows good cause for the delay, *Robinson*, 9 Cal. 5th at 897, nor that his situation falls  
19 under one of the narrow exceptions that excuse a petitioner from demonstrating good cause for  
20 substantial delay. *Reno*, 55 Cal. 4th at 460.

21 In his reply brief, Hernandez argues that he did not become aware of his federal claim  
22 regarding his cellmate’s statement until June 2019, thus causing the delay between the filing of  
23 his superior court habeas petition and his appellate court habeas petition. (Doc. No. 14 at 4). The  
24 pleadings dispute this claim. Hernandez filed an inmate appeal on July 8, 2018 in which he stated  
25 that “the statement and evidence provided by [the cellmate] show that appellate is innocent.”  
26 (Doc. No. 11-1 at 50, 56-59). Hernandez states he attached a copy of his cellmate’s “plea and  
27 statement” to that appeal, which included his cellmate’s statement that the box cutter did not  
28 belong to Hernandez and Hernandez had no knowledge of the box cutter. (Doc. No. 1 at 19).



1 Moreover, in his second level of appeal sent for review on July 13, 2018, Hernandez stated that  
2 his cellmate admitted that he, Hernandez, “had no knowledge of the object.” (Doc. No. 11-1 at  
3 59; Doc. No. 11-3 at 73). Accordingly, Hernandez’s contention that he did not become aware of  
4 his federal claim until June 2019 is implausible and contradicted by the pleadings.

5 Based upon the foregoing factual findings and binding precedent, the undersigned finds  
6 Hernandez’s seven-month delay between filing his superior court and appellate court habeas  
7 petitions was unreasonable. This unreasonable delay bars Hernandez from statutory tolling.  
8 Accordingly, because the petition was filed beyond the one-year period set forth in AEDPA’s  
9 statute of limitations, alternatively, the petition should be dismissed as untimely.<sup>3</sup>

#### 10 IV. CERTIFICATE OF APPEALABILITY

11 State prisoners in a habeas corpus action under § 2254 do not have an automatic right to  
12 appeal a final order. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36  
13 (2003). To appeal, a prisoner must obtain a certificate of appealability. 28 U.S.C. § 2253(c)(2);  
14 *see also* R. Governing Section 2254 Cases 11 (requires a district court to issue or deny a certificate  
15 of appealability when entering a final order adverse to a petitioner); Ninth Circuit Rule 22-1(a);  
16 *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997). Where, as here, the court denies  
17 habeas relief on procedural grounds without reaching the merits of the underlying constitutional  
18 claims, the court should issue a certificate of appealability only “if jurists of reason would find it  
19 debatable whether the petition states a valid claim of the denial of a constitutional right and that  
20 jurists of reason would find it debatable whether the district court was correct in its procedural  
21 ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “Where a plain procedural bar is present  
22 and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not  
23 conclude either that the district court erred in dismissing the petition or that the petitioner should  
24 be allowed to proceed further.” *Id.* Here, reasonable jurists would not find the undersigned’s

---

25  
26 <sup>3</sup> The Court notes that equitable tolling may be granted to a petitioner under limited circumstances. *See*  
27 *Holland v. Florida*, 560 U.S. 631, 649 (2010). Other than arguing when he learned of the claim,  
28 Hernandez advances no other arguments in support of equitable tolling. Accordingly, the Court declines  
to analyze whether equitable tolling applies in this case.

1 conclusion debatable or conclude that petitioner should proceed further. The undersigned therefore  
2 recommends that a certificate of appealability not issue.

3 Accordingly, it is **ORDERD**:

4 The Clerk of Court shall provide petitioner with a prisoner civil rights complaint form.

5 It is further **RECOMMENDED**:

- 6 1. Respondent's motion to dismiss (Doc. No. 11) be **GRANTED**.
- 7 2. The petition (Doc. No. 1) be **DISMISSED**.
- 8 3. Petitioner be denied a certificate of appealability.

9 **NOTICE TO PARTIES**

10 These findings and recommendations will be submitted to the United States District Judge  
11 assigned to the case pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-one  
12 (21) days after being served with these findings and recommendations, any party may file written  
13 objections with the court. The document should be captioned "Objections to Magistrate Judge's  
14 Findings and Recommendations." Any response to the objections shall be filed within fourteen  
15 (14) days after service of the objections. The parties are advised that failure to file objections  
16 within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772  
17 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

18  
19 IT IS SO ORDERED.

20 Dated: June 28, 2021

21   
22 HELENA M. BARCH-KUCHTA  
23 UNITED STATES MAGISTRATE JUDGE  
24  
25  
26  
27  
28